UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| **TIFFANY (NJ) INC. and TIFFANY AND COMPANY,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**eBAY INC.,**<br><br>**Defendant.** | **04 Civ. 4607 (KMK)**<br><br>**MOTION IN LIMINE** |

# MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE TO EXCLUDE THE PROPOSED EXPERT TESTIMONY OF GEORGE MANTIS

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Defendant eBay Inc. ("eBay") respectfully submits this memorandum of law in support of its motion, pursuant to Rules 403 and 702 of the Federal Rules of Evidence, to exclude the opinion and testimony of George Mantis (the "Mantis Report") as well as the conclusions derived from the implementation of the buying programs Mr. Mantis designed. (Exhibit A)

## PRELIMINARY STATEMENT

Tiffany claims eBay is responsible for counterfeit jewelry listed on its site by third parties. Tiffany seeks to introduce the results of two "Buying Programs" designed by Mr. Mantis that supposedly show the percentage of listings offering counterfeit Tiffany jewelry posted on the eBay site. The Buying Programs do nothing of the sort.

Tiffany created an artificial environment where it was more likely than not that counterfeit items would be found. The Buying Programs used search parameters that had been designed by Tiffany's own anti-piracy team – not Mr. Mantis – to maximize Tiffany's chances of identifying counterfeit listings when reporting listings to eBay. For example, Tiffany searched only for listings offering "Tiffany sterling," which represent only a small subset of the many Tiffany items available on eBay's web site. Tiffany also conducted its Buying Programs after it had stopped reporting counterfeit listings to eBay, artificially inflating the number of counterfeit listings on the site compared to when Tiffany was cooperating with eBay's efforts to fight counterfeits. These flaws are not surprising given Mr. Mantis' admission that he is not an expert in conducting these types of surveys.

Tiffany's study is like sending an expert to an untapped oil-rich field in Texas, having him dig a test well, and offering up his conclusion that oil is everywhere. This is not scientific proof, and it is not admissible evidence.

## STATEMENT OF FACTS

### What eBay Is And How It Works

As will be demonstrated at the trial in this case, eBay provides an online marketplace, similar to a newspaper's classified advertising service, where more than 200 million members worldwide have offered for sale and purchased billions of items across more than 50,000 categories. eBay itself does not sell any products; rather, eBay's users create and post what are, in effect, electronic classified listings soliciting offers for goods. eBay does not create, pre-approve or edit the content, title or description of any listing provided by any seller. Any registered eBay user can bid on any of the approximately 90 million items listed on the eBay website at any given time in an auction-style format, or buy any item offered at a fixed price. eBay never takes ownership, possession, custody or control of the items sold through its site and therefore cannot inspect or examine any items to determine their authenticity. However, eBay encourages intellectual property rights owners to report any listings that the rights owner believes are offering infringing items and eBay will remove the reported listing. This program is known as "VeRO" – the Verified Rights Owner program.

### Origin And Purpose Of Mr. Mantis' Buying Programs

On June 18, 2004, Tiffany commenced this litigation, suing eBay for direct and contributory trademark infringement under the Lanham Act. The gravamen of Tiffany's infringement claims lies in its contention that "because of the limited channels of trade for genuine Tiffany merchandise, and based on Tiffany's experience in monitoring eBay's website, a seller who is offering more than a small quantity"—i.e., five or more—"of jewelry items that he or she claims are from Tiffany is almost certainly selling counterfeit Tiffany goods." First Amended Complaint ¶ 33.

During 2003 and 2004, Tiffany charged a paralegal with the responsibility of policing the use of the Tiffany trademarks in listings posted by third-party sellers on the eBay website. See id. ¶ 37; see generally Deposition of Ewa Zalewksa. John Pollard, Tiffany's Manager of Investigations, and Ms. Zalewska developed search parameters to police the Jewelry & Watches Category of the eBay website for listings of potentially counterfeit Tiffany items to report to eBay. See Zalewska Dep. at 13-14; Deposition of John Pollard at 37-38 (stating that the search used was "Tiffany sterling within the jewelry category with the exceptions pulling out the words vintage, like, similar and some other words that I don't remember right now."). These searches were designed to maximize their chances of finding counterfeit items. The searches were not designed to determine what percentage of Tiffany listings on the site are counterfeit.

**Design Of The Buying Programs**

In an attempt to develop support for its claim regarding the extent of counterfeit Tiffany merchandise offered by eBay members, Tiffany retained George Mantis to design a buying program to sample Tiffany goods available through eBay.com. See First Amended Complaint ¶ 38; eBay Exhibit 266 (the "Buying Program Protocol"). Mr. Mantis claims that the Buying Program Protocol utilized a "statistical technique[] for drawing inferences about the population" from a sample where "all items of interest listed on eBay have an equal and independent chance of being selected for purchase." Buying Program Protocol at 1.

In the Buying Program Protocol, Mr. Mantis stresses that one of the advantages of the Buying Programs is that the percentage of items in the sample determined to be counterfeit can be generalized "to the entire population of items of interest on eBay." See id. The actual Buying Program that Mr. Mantis designed, however, does not give all items of interest an equal and independent chance of selection because instead of defining a population – or "universe" – that captured all of the listings offering Tiffany jewelry items, Mr. Mantis simply adopted the search parameters used by Tiffany to police eBay's site for potentially counterfeit items. See (Declaration of Denise Alvarez Exh. 1) ("Mantis Dep.") at 25-31.

**Implementing The 2004 And 2005 Buying Programs**

The Buying Program Protocol called for a two hundred (200) item sample of items purchased over a ten (10) day period. See Buying Program Protocol at 4. Tiffany conducted two Buying Programs: one spanning January and February 2004, and the other occurring in April 2005. Mr. Mantis' role was limited to designing the protocol. Tiffany chose to rely on a team of paralegals from outside counsel's office to implement the sampling protocol. Mary Grasso, then a paralegal in Dorsey & Whitney's New York office, led the team of paralegals charged with implementing Mr. Mantis' protocol, see Deposition of Mary Grasso at 8-9, and Mr. Mantis played no role—supervisory or otherwise—in the implementation of the Buying Programs. See Buying Program Report (the "Mantis Report") at 6-7. In fact, Mr. Mantis was unaware that a second Buying

Program had been implemented until he was asked to prepare his expert report in this matter. See Mantis Dep. at 101.

Each morning of the Buying Programs, Ms. Grasso performed the following search on the eBay website:

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| Search Words: | Tiffany Sterling |
| Category: | Jewelry & Watches |
| Words to Exclude: | like, similar, setting, style, cz, settings, amber, charm, TURQUOISE, vintage, Navajo |

See id. at 2; Grasso Dep. at 16-18. These search parameters, however, were designed by Ms. Zalewska and Mr. Pollard to search for potentially counterfeit listings of Tiffany merchandise—not to canvas the entire universe of Tiffany jewelry sold through listings on eBay. The resulting list of items was therefore a subset of all of the Tiffany jewelry available on eBay.com and did not include non-jewelry items, jewelry items made from materials such as gold and platinum, or even any silver jewelry items that were not labeled or described by the seller using the word "sterling." Sellers on the eBay site are more likely to use the word "silver" than "sterling" to describe silver jewelry. In addition, the search terms defined in Mr. Mantis' protocol do not relate in any way to the key indicator of counterfeiting activity Tiffany emphasized in its First Amended Complaint—the sale of five or more pieces of Tiffany jewelry by one seller.

From each day's search results, Ms. Grasso would print-out the eBay web pages containing all the listings that were responsive to Mr. Mantis' search terms, generally about 1,600 items. See Grasso Dep. at 16-20. Following the criteria outlined in Mr. Mantis' protocol, Ms. Grasso would use an online random number generator and a manual counting procedure to select 20 items, which she would assign other paralegals to purchase. See id. Ms. Grasso used spreadsheets designed by Tiffany's counsel for both the 2004 and 2005 Buying Programs to record the results of the Buying Programs.[1] See id. at 39-40; Buying Program Protocol at 7-8.

Not all of these purchases were successful and not all purchased items were received, but those items that were actually received were sent to Tiffany's Quality Assurance Department for inspection. See Deposition of George Callan Vol. 1 at 72-74. These Quality Assurance personnel were told the items had been purchased on eBay and were asked to determine whether the items were counterfeit. See id. at 72, 78. Tiffany's inspectors analyzed the physical items—not the digital images posted by the sellers in the listings on eBay—using numerous tools, including microscopes, ring mandrills, calipers, a scale, and special fluorescent lighting. See id. Vol. 2 at 22. Indeed, one of Tiffany's inspectors, George Callan, testified that he would "never make [an authenticity] decision based on a photograph" and "[a]s a matter of principle, [he] would want to see the piece and take a very close examination before [he] would authenticate a piece as Tiffany or not Tiffany." Id. Vol. 1 at 27.

Mr. Mantis then calculated the percentage of counterfeit items in the sample by dividing the number of items determined to be counterfeit by the Quality Assurance personnel by the total number of items successfully purchased and received by the paralegals. Using this overly-simplified calculation, Mr. Mantis concluded that 73.1 percent of the items purchased in the 2004 program and 75.2 percent of the items purchased in the 2005 program were counterfeit. See Mantis Report at 9. As explained

[1] See eBay Exhibit 267 (2004 Buying Program Spreadsheet); eBay Exhibit 265 (2005 Buying Program Spreadsheet).

below, Mr. Mantis' Buying Programs were so flawed that they do not "provide an unbiased estimate of the extent that listings of TIFFANY goods for sale on eBay consist of counterfeit Tiffany & Co. merchandise." Id. at 1.

## ARGUMENT

### I. LEGAL STANDARDS GOVERNING THE ADMISSIBILITY OF EXPERT TESTIMONY

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Supreme Court has made clear that trial courts have a "gatekeeping" function under Rule 702, and are charged with "the task of ensuring that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrel Dow Pharms., Inc., 509 U.S. 579, 597 (1993); see also Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 270 (2d Cir. 2002) (affirming exclusion of plaintiffs' experts' opinions because of defects in methodology that rendered them unreliable). The Supreme Court's decision in Kumho Tire Co. v. Carmichael clarified that this "gatekeeping function applies not just to scientific expert testimony as discussed in Daubert, but also to testimony based on technical and other specialized knowledge. . . ," such as the statistical opinion offered by Tiffany in this matter. 526 U.S. 137, 141 (1999). Indeed, the "evidentiary reliability of expert testimony relating to statistical matters depends on whether the underlying statistical study conforms to generally and widely accepted statistical methodologies." Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.06[4], at 702-142-43 (2d ed. 2006). Therefore, even in a bench trial, when "an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony." Amorgianos, 303 F.3d at 266; Bradley v. Brown, 852 F. Supp. 690, 700 (N.D. Ind. 1994).

In exercising its gatekeeping function under Rule 702, the Court must determine whether: (1) the proffered witness may be qualified as an expert in the relevant field; (2) the proffered witness testimony is relevant to the facts of the case; and (3) the proffered testimony has a sufficiently reliable foundation to permit it to be considered. See id. at 265-66.

## II. MR. MANTIS IS NOT QUALIFIED TO OFFER OPINIONS BASED ON STATISTICAL SAMPLING

To warrant admission, the proponent of expert testimony must demonstrate by a preponderance of the evidence that the witness has the necessary academic training and practical experience to support the opinion. See Daubert, 509 U.S. at 592 n.10; Rules 104(a), 702.[2]

[2] If the proffered witness' expertise is "too general or too deficient," the Court "may properly conclude that [the witness] is "insufficiently qualified despite the relevance of [his] testimony." Stagl v. Delta Airlines, Inc., 117 F.3d 76, 81 (2d Cir. 1997). Specifically, the court must determine whether a proposed witness's qualifying training or experience and resultant specialized knowledge are sufficiently related to the issues and evidence before the trier of fact that the witness's proposed testimony will be of assistance to the trier of fact. See Dreyer v. Ryder Auto. Carrier Group, No. 98-CV-82A(F), 2005 WL 1074320, at *7 (W.D.N.Y. Feb. 9, 2005) (excluding an expert with a doctorate in mechanical engineering from testifying regarding the functions of a particular industrial machine where the expert lacked substantial experience with the device); Ralton v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969-70 (10th Cir.

Mr. Mantis does not. Statistical sampling is a specialty even within the specialized field of statistics that requires training beyond general statistics courses. Sampling statisticians generally have Ph.D or Master's degrees in statistics. See "Evaluation of the 2004 and 2005 Tiffany from eBay Buying Programs" (the "Ericksen Report") at 1, 3 (attached as Exhibit B). Mr. Mantis, however, never took any courses in statistical sampling at the university level. See Mantis Dep. at 8-9.

Instead, Mr. Mantis specializes in designing and implementing simple "shopping mall" surveys to disprove the likelihood of consumer confusion. As Mr. Mantis conceded in his deposition, the Buying Programs were surveys of "objects" rather than subjective consumer perception surveys, and he has not performed a survey of objects even remotely resembling the "protocol" at issue here since his school days. See id. at 40-41.

Since Mr. Mantis lacks "the necessary academic training and practical experience" in designing complex statistical samples, his opinion, testimony, and the conclusions derived from the Buying Programs should be excluded from this proceeding. See Daubert, 509 U.S. at 592 n.10; see also Kumho Tire, 526 U.S. at 152 (requiring a proffered expert to "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."). Moreover, as explained below, Mr. Mantis' inadequate education and training in statistical sampling resulted in a

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2001) (upholding the lower court's finding that the proposed expert, a board-certified orthopedic surgeon, was not sufficiently qualified to testify regarding a type of orthopedic treatment).

flawed sampling model that must be excluded from this proceeding as irrelevant and unreliable under Daubert and Rule 702.

## III. MR. MANTIS' OPINION AND TESTIMONY ARE NOT RELEVANT TO TIFFANY'S CLAIMS

A proposed expert's opinion fails to meet the relevance or "fit" requirement enunciated in Daubert "if the data relied upon by the expert is materially different from the data relevant to the facts of the case." Astra Aktiebolag v. Andrx Pharm., Inc., 222 F. Supp. 2d 423, 488 (S.D.N.Y. 2002) (citing Daubert, 509 U.S. at 591). Moreover, "if the expert has failed to consider the necessary factors or if the analysis is premised upon a faulty assumption, his testimony may be excluded for lack of probative value." Id. Mr. Mantis' testimony should be excluded because his analysis is premised on a faulty assumption—that he sampled the entire universe of Tiffany jewelry available through eBay.

In statistical sampling, if the sample of items from a defined universe of relevant items randomly selected and tested is representative, then the results from the sample may be applicable to the full universe. See Ericksen Report at 10. As Mr. Mantis acknowledges, "[t]he starting point in any sampling procedure is to define the population of items from which the sample is to be drawn." Buying Program Protocol at 2 This is because the "population [universe] comprises . . . the objects that are relevant to the subject matter of the litigation." Mantis Dep. at 30 (emphasis added).

Yet Mr. Mantis did not properly define the population of items from which to draw his sample. In its First Amended Complaint, Tiffany claims there is an "immense problem of counterfeit Tiffany jewelry on eBay" and contends that the 2004

Buying Program established that 73 percent of the jewelry items that use the Tiffany trademark as part of their listing titles or descriptions are fakes. See First Amended Complaint ¶¶ 31, 38. The Buying Programs, however, established no such thing because instead of sampling "items available for auction on e-Bay"—the stated purpose of the Buying Programs—they only considered a small, skewed, subset of relevant items. Buying Program Protocol at 1.

Mr. Mantis correctly states that the Buying Programs' universe should be "items available for auction on eBay." Id. Yet he did not design a study that would sample that universe. Instead, he "relied on the protocol that Tiffany has developed in its policing activities" to maximize its chances of finding listings offering counterfeit items by significantly limiting that universe. Mantis Dep. at 29. Mr. Mantis did not know how Tiffany developed these search terms and never bothered to ask. See id. at 29-30.[3]

Using search parameters specifically designed by Tiffany personnel to identify listings of potentially counterfeit Tiffany items meant that Mr. Mantis' universe is a small subset of listings of jewelry items that use the Tiffany trademark in their title or description: only listings containing both the words "Tiffany" and "Sterling" in the title or description but not the words "like, similar, setting, style, cz, settings, amber, charm, TURQUOISE, vintage, [or] Navajo." Buying Program Protocol at 2. Thus, items

[3] Notably, even in Mr. Mantis' claimed area of expertise—consumer survey design—the principle factor that courts consider in assessing the reliability of a survey is whether the universe was properly defined. See Scherring Corp. v. Pfizer Inc., 189 F.3d 218, 227-28 (2d Cir. 1999) (listing factors to be used in assessing the reliability of survey evidence). As is the case with statistical sampling, "[t]he failure to satisfy one of these criteria may result in the exclusion of the survey." Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112, 118 (2d Cir. 1984).

containing the word "silver" but not "sterling" would be excluded, even though vastly more sellers would describe their item as "silver" as opposed to "sterling." See, e.g., eBay Exhibits 154-56 (explaining that sellers offering the same Tiffany heart tag bracelet sometimes use the "Tiffany silver" designation and other times use the "Tiffany sterling" designation.); Ericksen Report at 6. So would jewelry items made from precious metals such as gold and platinum. There is no statistical or substantive reason for this arbitrary distinction made by sellers when listing their items for sale on eBay. Id. Remarkably, Tiffany's purported expert did not even understand the limitations of the search protocol he adopted. See Mantis Dep. at 90 ("I don't believe that sterling further modifies Tiffany in these search words. That's my understanding.").[4]

Mr. Mantis' errors were further compounded when he recommended that Tiffany suspend its policing activities over the course of the Buying Programs. In accordance with its duty to police its trademarks, in the ordinary course of business, Tiffany reports to eBay hundreds of listings Tiffany suspects of offering counterfeit Tiffany merchandise every day and eBay removes these listings. See Pollard Dep. at 33-34 (stating that he reviews hundreds of listings on eBay every day and reports more than half). Suspending all "policing activity conducted by Tiffany & Co. resulting in canceling auctions . . . for the duration of the buying program[s]," Buying Program Protocol at 2, increased the number of listings of potentially counterfeit Tiffany items present on the eBay website. This increase further exacerbated the biases present in the

[4] See Ericksen Report at 6-7 (illustrating the impact of Mr. Mantis' decision to sample such a limited universe).

universe sampled by the Buying Programs because it added many listings to the sample that would not be "items available for auction on eBay" in the ordinary course.[5]

Finally, Mr. Mantis' Buying Programs failed to consider Tiffany's claim that an eBay seller "is almost certainly selling counterfeit Tiffany goods" when the sellers' listings offer five or more Tiffany jewelry items. See First Amended Complaint ¶ 33. Presumably, this is because Tiffany concedes that there are instances where Tiffany reported listings from sellers who were offering five or more Tiffany items that later were proven authentic. See Zalewska Dep. at 64.

In short, Mr. Mantis' report is inadmissible to prove what percentage of Tiffany jewelry items listed on eBay are counterfeit because Mr. Mantis failed to identify the universe of listings relevant to Tiffany's claims. Instead, Mr. Mantis' "design" only picked items from a small subset of the "items available for auction on eBay" and this subset was decidedly skewed to include listings of potentially counterfeit Tiffany merchandise. Without a statistically justifiable basis for generalizing the results of the Buying Programs to the population of Tiffany jewelry items (or even Tiffany silver jewelry items) sold through the eBay website, Mr. Mantis' opinion, testimony and the conclusions derived from his Buying Programs do not "fit" the facts alleged by Tiffany and are therefore not relevant to Tiffany's claims. See Amorgianos, 303 F.3d at 265 (citing Rule 401); Astra Aktiebolag, 222 F. Supp. 2d at 488.

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[5] Because Tiffany was not reporting listings during that period, eBay could not suspend sellers' accounts based on repeated reports from Tiffany, further increasing the number of counterfeit listings on the site.

## IV. MULTIPLE ERRORS IN THE BUYING PROGRAMS' METHODOLOGY AND IMPLEMENTATION RENDER THEIR RESULTS UNRELIABLE

Proposed expert witness testimony must have a "sufficiently 'reliable foundation' to permit it to be considered." Amorgianos, 303 F.3d at 265 (citing Daubert, 509 U.S. at 597). When analyzing the offered proof, the Court should consider the indicia of reliability enumerated in Rule 702 and, in short, make certain that an expert, whether basing testimony upon professional studies or personal experience, "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire, 526 U.S. at 152. Indeed, it is critical that an expert's analysis be "reliable at every step" and "any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible." Id. at 267 (emphasis added).

Mr. Mantis' analysis was not reliable at any step, so any opinions or conclusions derived from his sample design must be excluded from this proceeding. See Dreyer, 2005 WL 1074320, at *6; Clark v. Takata Corp., 192 F.3d 750, 759 n.5 (7th Cir. 1999) ("[Q]ualifications alone do not suffice. A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in Daubert.").

For example, Mr. Mantis describes the Buying Programs as "a random selection method" where "all items of interest on eBay have an equal and independent chance of being selected for purchase." Buying Program Protocol at 1 (emphasis added). Mr. Mantis claims that this method is necessary in order to provide an unbiased and reliable measurement of the alleged counterfeiting activities conducted through the eBay website. See id.

But the Buying Programs do not give each listing of Tiffany jewelry items an equal chance of being selected for purchase. Mr. Mantis failed to consider the fact that sellers may list their items on eBay for one, three, five, seven or ten day periods, and that in many cases buyers can end a listing early by selecting the "Buy it Now" feature. This creates a significant bias towards auctions with longer terms, as ten day listings have a greater chance of being selected than shorter listings or listings that are ended early.[6] Had Mr. Mantis been familiar with statistical sampling methods, he would have recognized the problems presented by the different listing periods and Buy it Now feature, and could have designed the Buying Programs around them. See Ericksen Report at 9-11 (describing in detail the flaws in Mr. Mantis' statistical methodology).

The flawed implementation of the Buying Programs likewise renders them unreliable. Contrary to standard protocol, Mr. Mantis did not supervise his Buying Programs. As a result, Tiffany's team of paralegals incorrectly selected more than half of the items included in the 2004 sample and more than a quarter of the items included in the 2005 sample due to simple counting errors. See id. at 25. Given that one of the goals of Mr. Mantis' protocol was to have a probability sample where "all items of interest listed on e-Bay have an equal and independent chance of being selected for purchase," the paralegal team's numerous double-counting errors further undermine the reliability of the Buying Programs. See Buying Program Protocol at 1; see also Amorgianos, 303 F.3d at 267 (holding that "any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible") (emphasis in original).

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[6] For example, if a listing were available for all five business days of one week of the 2004 Buying Program, it would have five times more of a chance of being selected than a listing appearing for one day (such as a one day listing or a three day listing appearing on Friday and ending on a Sunday), which would only have had one chance. The Buying Programs were not conducted over weekends. See Buying Program Protocol at 4.

In addition, the paralegals failed to purchase the 200 items that Mr. Mantis declared as a "sufficient" sample size for a precise estimate of the percentage of listings offering potentially counterfeit Tiffany merchandise during both Buying Programs. See Buying Program Protocol at 4. The paralegals only succeeded in obtaining 86 percent of the items selected in 2004[7] and 57 percent of the items selected in 2005.[8]

Finally, the fact that Mr. Mantis claims to be an expert in consumer confusion surveys makes it even more surprising that he would allow the study to be conducted by paralegals employed by Tiffany's outside counsel – who were intimately familiar with the litigation – and not a third party unaware of the purposes of the study. Indeed, one of the prerequisites for a reliable consumer confusion survey is that the study should be implemented by those who lack "knowledge of the litigation or the purpose for which the survey [is] conducted." Mastercard Int'l Inc. v. First Nat'l Bank of Omaha, No. 02 CIV. 3691(DLC), 03 Civ. 707 (DLC), 2004 WL 326708, at *8 (S.D.N.Y. Feb. 23, 2004).

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[7] See Ericksen Report at 13-14 (listing the total number of items selected in 2004—including replacement items—and explaining the deviations from Mr. Mantis' prescribed 200 item sample size).

[8] See Ericksen Report at 14-15 (listing the total number of items selected in 2005—including replacement items—and explaining the deviations from Mr. Mantis' prescribed 200 item sample size).

Any of these errors alone would render the Buying Programs unreliable. Taken together, these errors render Mr. Mantis' report inadmissible and, as such, it should be excluded from this proceeding. See Daubert, 509 U.S. at 597 (stating that under Rule 702, the district court is charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.").

## CONCLUSION

For all the foregoing reasons, eBay respectfully submits that the opinion and testimony of George Mantis must be excluded from the trial in this proceeding.

Dated: New York, New York
October 6, 2006

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